Supreme Court, U.S.
FILED
OCT 15 1999
OFFICE OF THE CLERK

No. 99-465

In The

Supreme Court of the United States

CITY OF WESTMINSTER, CHARLES V. SMITH, CRAIG SCHWEISINGER TONY LAM, DON S. ANDERSON, JOHN T. DEMONACO, BRIAN MAYHEW, ROBERT HUNTLEY, CHARMAYNE BOHMAN AND RICHARD JONES,

Petitioners,

v.

DON HERR, JOE WILSON and MICHAEL GARRISON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

I. INTRODUCTION

This case arises out of the constitutional civil rights claims of six individual firefighters, including respondents, against the City of Westminster, and ten individual city officials, including petitioners. After two years of intense political fighting and controversy, in 1994, petitioners fired the firefighters in retaliation for the firefighters having exercised their First Amendment rights to engage in political activities and speak freely. One respondent, Michael Garrison ("Garrison") was fired because after someone died in a fire, he issued a press release critical of the Mayor and City Council for cutting the Fire Department's (the "Department") budget. Although the facts varied with respect to the circumstances surrounding the terminations of the other five firefighters, essentially petitioners based their actions on the pretext that the firefighters had violated a Fire Department ("Department") personnel policy.

After a jury trial on these claims and post-trial motions, the pertinent aspects of the judgment entered by the district court were the following: 1) judgment was entered for respondents Don Herr ("Herr") and Joe Wilson ("Wilson") on their First Amendment claims and on their related conspiracy claims; 2) judgment was entered for petitioners on respondent Garrison's First Amendment claim; and 3) Herr and Wilson were awarded reasonable attorneys fees. On appeal, the Ninth Circuit affirmed the verdicts for Herr and Wilson, and reversed and remanded for a new trial of Garrison's First Amendment claim.

This is a fact intensive case. The issues of law raised herein are neither novel nor areas of conflict among the circuits. In reaching its decision, the Ninth Circuit applied well established case law to the facts.

II. FACTS MATERIAL TO THE QUESTIONS PRESENTED.[1]

A. In 1992, City Officials Threatened Firefighters With Political Retribution.

The firefighters who were plaintiffs in this action were veteran firefighters, leaders in the Department, and active in the Westminster Firefighters' Association (the "union.") The union had been active in local politics for close to 20 years. Its members walked precincts and did other work in support of the candidates it endorsed.

Garrison was an 18 year veteran of the Department. He had served as Captain, paramedic, and training officer. He was also a leader in the union and in 1992, he served as both its public information officer and Chairman of the labor negotiations committee. He also worked as the campaign office manager in the elections in which the union participated. Both Herr and Wilson were 20 year veterans of the Department. Herr served as acting

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[1] Respondents hereby incorporate by reference the Statement of Facts in the decision below, *Gilbrook v. City of Westminster*, 177 F.3d 839 (9th Cir. 1999), *amended*, 99 Cal.Daily Op. Service 5641, 99 D.A.R. 7229, 1999 U.S. App. Lexis 15947. However, pursuant to Supreme Court Rule 15.2, respondents will address misstatements and omissions in petitioners' statement of the case in the Petition.

Chief and was a Battalion Chief; Wilson was a Captain. Both were active in the union's political activities.

In the summer of 1992, Garrison and union president Paul Gilbrook ("Gilbrook") met with petitioners Charles V. Smith ("Smith"), then Mayor, and Craig Schweisinger ("Schweisinger"), a member of the City Council, to discuss why the union was encountering problems in its negotiations with the City of Westminster ("City") regarding the union's expiring labor contracts. When the discussion reached the issue of staffing of the fire stations, an upset Smith said, "If you make this a political issue in my upcoming election, I'll have your ass" and walked out. A few weeks later, Garrison and Gilbrook were told by Schweisinger, "Chuck [Smith] is anti-fire now. You people supported your [sic] – you're going to support Joy Neugebauer [for Mayor.] We have problems here with this contract."

This political feud was the genesis of the petitioners' conflict with respondent firefighters, and it was the reason petitioners sought to retaliate against respondents for their First Amendment activity. Petitioners' statement of the case omits mention of these events and attributes the antagonism between the city officials and firefighters to a later budget battle. However, the record establishes that the budget battle, in fact, stemmed also from the political feud. As Schweisinger told Herr in mid-1993, after Smith was re-elected Mayor and recommendations for cuts in the Department's budget were first made public, "It's political retribution pure and simple."

B. Despite Citizen And Department Opposition, In July 1993, The City Lays Off Firefighters And Eliminates A Fire Truck From Service.

Budget and other recommendations about the Department by the Financial Review Committee, a committee of citizens appointed by the City Council, were considered and acted upon in July, 1993, by the City Council They included drastic cuts in fire services, measures to reduce overtime, the removal of a fire truck from service, the layoff of 10 firefighters and curtailment of the political activities of the firefighters. In the event that the firefighters failed to curb their political activities, the committee urged that fire services be contracted out and the Department be barred from bidding to provide those services.

These proposals were quite controversial and were met with vocal and public opposition. The union made a video to educate the public about the issues and circulated a petition to reflect citizen opposition to the cuts. The firefighters collected 14,000 signatures in four days and presented the petition to the City Council. Commenting to a citizen who worked on the petition, Schweisinger again said the cuts were being imposed because "Chuck [Smith] is anti-fire and this is all being done as political retribution." In the end, six firefighters were laid off and one truck was removed from service.

In the course of this highly public debate, the intensity of the rhetoric escalated. In response to the reorganization, the firefighters' union filed suit in state court to reverse the layoffs and cutbacks. The court restored the laid off firefighters to their positions, but the City would

not comply for several months and paid firefighters to stay home, despite the court order. The truck remained out of service. Also in the summer of 1993, the city hired John Demonaco ("Demonaco") to serve as the new Fire Chief.

C. The Candlewood Fire Leads To Garrison's Suspension.

1. The Fire Claims A Child's Life.

On January 28, 1994, there was a fire in Westminster on Candlewood Street. The fire call was responded to by Station 2, with its post-reorganization single engine, and by a Fountain Valley fire truck and medic unit. Firefighter Hal Raphael ("Raphael") was the Battalion Chief on the scene and in charge of the fire. Shortly after he arrived, he was told by on-lookers that there were children in the house. A few minutes later, he learned that a dead child had been discovered face down in a bathtub on the first floor.

Later that night, Raphael called Garrison, the union's public information officer, to tell him about the fire and the fatality. The next morning when Raphael got off his shift at seven a.m., Garrison was at the station. Raphael told him he "felt bad because I felt my hands was (sic) tied because I didn't have the equipment and the people to do the job." Before calling Garrison the night before, Raphael had reviewed the response times of the trucks; Fountain Valley firefighters arrived two and one-half minutes after the Westminster engine did. Raphael felt that the loss of equipment and manpower for those two

and one-half minutes might have made the difference between life and death for the victim.

2. The Press Release.

The morning after the fire, Garrison also talked to Benedetti, the first-in captain, and two other firefighters, Blain and Joseph, who had been inside the house fighting the fire. He then met with the union's executive board and they decided to issue a press release. The press release said, "This tragedy is the direct result of the Mayor and Council placing politics above the safety of the people." Garrison testified that they issued the release to alert the community to the threat to public safety because the Department's equipment and manpower had been cut. Shortly after his statement about the fire, Garrison was suspended on paid leave for issuing the release.

D. Firing Of Garrison, Herr And Wilson.

Two and a half months after his suspension, Garrison received a Notice of Intent to Terminate, dated April 14, 1994. The grounds for his termination were that his statement to the press went "beyond appropriate 'public comment' and constitutional protections. . . . ," as well as that he had failed to comply with a City policy requiring documentation of various types of leave. He received his termination notice one month later. In August, 1994, City Manager Robert Huntley ("Huntley") denied Garrison's last grievance appeal.

Also in April, 1994, Demonaco issued Notices of Intent to terminate Herr and Wilson, allegedly based in

whole, or in part, on their alleged failure to comply with the same City personnel policy.[2] Juxtaposed to other firefighters, Herr's alleged personnel policy violations were comparatively minor. Herr had taken only one day of sick leave and seven vacation days over seven years for which he allegedly had not filed any documentation. The jury ultimately concluded the purported personnel policy violations were a pretext for the illegal firings of Herr and Wilson.

E. Procedural History.

On March 31, 1994, the union, Gilbrook, and Garrison sued the City and various city officials for First Amendment violations based on disciplinary action taken in retaliation for exercising their rights of free speech and association. Later that year Herr, Raphael, Bowler, and Wilson joined as plaintiffs.

The jury trial on the claims of Gilbrook, Garrison, Herr, Raphael, Wilson, Bowler, and the union began on July 25, 1995. At the close of plaintiffs' evidence, defendants moved for judgment as a matter of law. The court granted the motion with respect to Garrison's First Amendment claim. As to the remaining First Amendment claims, the motion was granted for all defendants except Demonaco, Anderson and Huntley who played direct

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[2] Raphael and Dana Bowler, both plaintiffs below, were also fired at this time on similar grounds. Gilbrook had been suspended and then fired in February 1994, in part because of his personnel policy violations.

roles in the disciplinary process; it was denied as to all defendants with respect to the conspiracy claims.

By special verdicts, Herr, Wilson and Bowler prevailed on First Amendment and equal protection claims against Demonaco, Assistant City Manager Don Anderson ("Anderson"), and Huntley. They also prevailed on conspiracy claims in connection with the constitutional rights violations against Demonaco, Anderson, Smith, Schweisinger, Council Member Tony Lam and Finance Director Brian Mayhew. Plaintiffs prevailed on the City's liability. Compensatory and punitive damages were awarded.

On November 21, 1995, defendants moved for judgment as a matter of law and a new trial. On July 17, 1996, the district court ruled on the motions. It denied the motions for judgment notwithstanding the verdict and new trial as to the First Amendment retaliation and conspiracy claims, but granted the motion as to the equal protection claims and also remitted punitive damages awards against three defendants.

Appeal and cross-appeal were timely filed. The Ninth Circuit issued its opinion May 21, 1999. It affirmed the judgments for Herr and Wilson on their First Amendment claims, affirmed the judgment for defendants on the equal protection claims, and reversed and remanded for new trial on Garrison's First Amendment claim. Petitions for re-hearing were denied and the Ninth Circuit issued an amended opinion July 15, 1999.

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

III. THE NINTH CIRCUIT'S APPLICATION OF MT. HEALTHY IS ENTIRELY CONSISTENT WITH THIS COURT'S DECISION AND THOSE OF OTHER CIRCUITS.

A. In Retaliatory Firings, Where The Actors In A Chain Of Decision Makers Are Not Equally Culpable, Case Law Provides Rules For Causation.

Petitioners challenge the Ninth Circuit's application of this Court's decision in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 50 L.Ed.2d 471, 97 S.Ct 568 (1977) ("*Mt. Healthy*"). Here, the decisions to terminate respondents from their positions as firefighters were made by Demonaco and Assistant City Manager Anderson. Appeal was made to Huntley. The jury found that protected conduct was a "substantial or motivating" factor in the decisions of Demonaco and Anderson, but that it was not in Huntley's decision. Finding that the discipline was pretextual and that the exercise of constitutional rights was "a motivating or substantial factor behind defendants' decision" to discipline petitioners, the trial court judgment affirmed the jury's award of damages to Herr and Wilson.

Petitioners argued erroneously on appeal, and in the Petition for Writ of Certiorari (the "Petition") that the jury's failure to find Huntley substantially motivated by respondents' exercise of their First Amendment rights was equivalent to a finding of independent and innocent motives on his part. Further, they contend that Huntley's

'legitimate' motives trumped any unlawful motives present earlier in the process. Respondents do not agree, nor did the trial court or the Ninth Circuit.

The Ninth Circuit's resolution of the issue is found in its application of the *Mt. Healthy* holding to the specific facts of this case, with citation to analogous cases in other circuits. *Gilbrook v. City of Westminster*, Appendix to Petition ("App.") at 18-22. In a retaliatory firing case where mixed motives are shown, once the employee has established that his discipline was "substantially" motivated by his constitutionally protected conduct, the burden shifts to the employer to prove that it would have imposed the same discipline even in the absence of the protected conduct. *Mt. Healthy, supra* 429 U.S. at 287. The Ninth Circuit wrote, "The First Amendment . . . 'is sufficiently vindicated if such an employee is placed in no worse a position than if he had not engaged in the conduct.' " App. at 19, quoting *Mt. Healthy, supra* 429 U.S. at 285-86.

The Ninth Circuit determined that the requisite causation under *Mt. Healthy* is not automatically lost because of the presence of a so-called 'innocent decision-maker.' App. at 20. The court must engage in an "intensely factual" inquiry in order to resolve the causation question. App. at 23. Where a series of acts is set in motion due to impermissible retaliatory motivation, and the 'innocent decision-maker' relies upon, or is influenced by, the initial acts or reasoning of the wrongdoer(s), sufficient causation exists. App. at 21.

The test applied by the court was to ask whether the 'innocent' decision-maker, Huntley, would have imposed

discipline in the absence of the charges brought by Demonaco and rubber stamped by Anderson. App. at 24. Facts in the record supported the determination that Huntley's actions were based upon Demonaco and Anderson's recommendations. For example, Huntley's "hearings" lasted no more than two to five minutes, by his own admission, and his decisions were based upon review of the materials prepared by Demonaco and Anderson. The Ninth Circuit concluded that the jury's verdict reflected its conclusion that Huntley would not have brought charges on his own, and therefore the result in the case was consistent with *Mt. Healthy*. *Id.*

B. Case Law Supports The Ninth Circuit's Decision; Petitioners' Cases Are Not On Point.

The Ninth Circuit discussed analogous retaliatory discharge cases in other circuits. In *Professional Association of College Educators v. El Paso County Community College District*, 730 F.2d 258, 266 (5th Cir. 1984), the court determined that although the Board of Trustees did not dismiss the plaintiff in retaliation for his protected conduct, but for the events set in motion by the wrongdoing college president, they would not have considered dismissal at all. Accordingly, the court affirmed a jury's award of damages against the college president. *Id.* at 267. In *Saye v. St. Vrain Valley School District*, 785 F.2d 862, 867-68 (10th Cir. 1986), even though the school board voting not to renew plaintiff's contract was not aware of her union activity, the court held that the plaintiff's discharge nevertheless could have been found to be in retaliation for her union activities. This was because the

evidence showed that the board relied on the recommendation of defendants whose motive was retaliatory. Thus, the court reversed the directed verdict for defendants and remanded for a new trial. *Id.* Finally, in *Hickman v. Valley Local School District Board of Education*, 619 F.2d 606, 610 (6th Cir. 1980), the court found a sufficient causal link where the majority of the decision-making board relied on recommendations of a defendant who acted out of constitutionally impermissible motives.

Also consistent with these cases is *Ware v. Unified School District No. 492*, 881 F.2d 906, 913 (10th Cir. 1989.) In that case, the secretary to a school district superintendent took a political position adverse to that of the superintendent on a pending bond issue. After the election on the bond issue, the superintendent recommended to the school board that the plaintiff not be hired again, citing as reasons subjective factors which, upon analysis, all stemmed from their political clash. The plaintiff was fired and she filed suit alleging retaliatory firing. The district court granted a directed verdict for the school board and a judgment notwithstanding the verdict ("jnov") for the superintendent. The appellate court reversed the judgment as to both, finding that the evidence was sufficient to support a conclusion that either the board delegated its decision to the superintendent, or acted in disregard of the plaintiff's First Amendment rights. *Id.*

In reversing the jnov, the appellate court concluded that the district court "clearly substituted its judgment for that of the jury." *Id.* at 911. It noted that "jury verdicts are not to be lightly overturned. . . . " *Id.* The same could be remarked of petitioners' efforts herein. The jury's verdict of liability for retaliatory firing was amply supported

by substantial evidence and consistent with well-established law. As such, there was no reason to disturb it on appeal.

Petitioners do not offer *any* authority which conflicts with the above cited cases. The cases which are cited in the Petition were all cited below and are inapposite. These cases share the common characteristics that they are employment discrimination cases and they turn on the absence of a material element of causation, not on the issue of an intervening "innocent" decision-maker. In *DeHorney v. Bank of American National Trust & Savings Association*, 879 F.2d 459, 468 (9th Cir. 1989), the court affirmed summary judgment for the defendant, where the plaintiff, DeHorney, failed to meet her initial burden and establish that she was fired for reasons of race. Additionally there was "some confusion" about who actually made the decision to terminate her. *Id.* Neither circumstance was present herein.

In *North v. Madison Areas Association For Retarded Citizens-Developmental Centers Corp.*, 844 F.2d 401 (7th Cir. 1988) ("*MAARC*"), the plaintiff who sued his employer under Title VII "failed to demonstrate that the Board's proffered reasons for eliminating North's position were pretextual, or that race was a motivating or substantial factor behind that decision." *Id.* at 408. Unlike in *MAARC*, the jury here did find that exercise of First Amendment rights was a substantial factor in the decisions to fire plaintiffs and that the personnel policy violations were pretext. Similarly, in *Willis v. Marion County Auditor's Office*, 118 F.3d 542, 548 (7th Cir. 1997), there was *no* evidence that the person who actually fired the plaintiff did so for reasons of racial bias.

Only in *Long v. Eastfield College*, 88 F.3d 300, 307-308 (5th Cir. 1996), do petitioners come anywhere close to the issue at hand. There, the court reversed summary judgment on the ground that there were triable issues of fact as to whether the actual decision-maker had performed an independent investigation or was just a "rubber stamp" for his subordinates' retaliatory recommendation to fire the plaintiff. However, the instant case was not in that procedural posture. Here, the jury reached its conclusions as trier of fact, having heard the evidence and assessed the witness' credibility. It decided that in the absence of the respondents' protected conduct, they would not have been disciplined, regardless of Huntley's motivation. Petitioners essentially are seeking another crack at overturning the jury's verdict on the facts in this case, which is not a suitable basis for United States Supreme Court review.

Long also points to the key observation made by the Ninth Circuit – "the *Mt. Healthy* mixed-motive inquiry is an intensely factual one, the results of which will vary depending on the circumstances." App. at 23. The petitioners give the decision an unfounded alarmist reading, that because of it "legitimate grounds for discipline are ultimately irrelevant." Petition at 12. Contrary to the petitioners' interpretation, the Ninth Circuit emphasized that "if the facts showed that the final decision-maker made a wholly independent, legitimate decision to discharge the plaintiff, uninfluenced by the retaliatory motives of a subordinate," it would not necessarily have reached the conclusion it did herein. App. at 23-24.

In sum, respondents have failed to demonstrate that the Ninth Circuit's decision in the instant case conflicts

with any decision of this Court or with any decisions in other circuits. The federal question, the requisite causation required in a mixed-motive case of retaliatory firing under the First Amendment, was resolved in a manner entirely consistent with the controlling case on the question, *Mt. Healthy*. The Ninth Circuit simply applied the rule and rationale of *Mt. Healthy* to the facts of this case consistent with the approach of numerous other circuits. Each of the other circuits applied the same principle, that the requisite causation could be found in a chain of events which would not have resulted in injury to the plaintiff in the absence of an impermissible retaliatory motive. There is no reason for this Court to grant certiorari on the First Amendment issue presented by this case.

IV. THE DECISION TO REVERSE THE DIRECTED VERDICT FOR PETITIONERS ON GARRISON'S FIRST AMENDMENT CLAIM SIMPLY INVOLVED APPLICATION OF *PICKERING* TO THE FACTS OF THE CASE; IT PRESENTS NO ISSUE FOR THIS COURT.

A few months after the City Council enacted the controversial cutbacks in the Department, there was a fire in the area served by the station which had a truck taken out of service. A child was killed in the fire. Based on what he learned from witnesses and saw himself at the scene of the fire, Raphael, the Battalion Chief in charge at the fire, concluded that the loss of the second truck probably contributed to the firefighters' inability to save the child. Raphael called Garrison to inform him of the death, and early the next day, Garrison interviewed other

firefighters who had actually been in the burning house. Then he convened a meeting of the union's Executive Committee to consider what action, if any, to take. They decided to issue a press release which stated, "This tragedy is the direct result of the Mayor and Council placing politics above the safety of the people." Explaining the decision to issue the release, Garrison testified, "I made a statement because we had a death. A death we felt could be prevented. . . . And there was a position of public safety, and we were trying to bring that out into the community."

At the time of the Candlewood fire, the adequacy of the Department's budget to insure the public's safety had been the subject of debates and citizen protests throughout the City for more than a year. The press release was part of that on-going debate and it concerned a public safety issue about which citizens were obviously quite concerned. The Ninth Circuit agreed with respondents that the release clearly involved a matter of public concern. App. at 50. *See Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed. 2d 708 (1983).

Respondents also cited below several other cases involving similar or analogous facts which had been found to be matters of public concern. *See Burgess v. Pierce County*, 918 F.2d 104, 105-06 (9th Cir. 1990) (Fire Marshall's statements that ordinances conflicted with state fire safety standards held, without elaboration, to be matters of public concern); *Roth v. Veteran's Admin. of U.S.*, 856 F.2d 1401, 1406 (9th Cir. 1988) (Doctor's speech criticizing administrator's use of resources, mismanagement, and safety violations held protected by First Amendment); *Firefighters Assn. District of Columbia v. Barry*, 742

F.Supp. 1182 (D.C.C. 1990) (Firefighter's statements at press conference about effectiveness of equipment held to be "obviously" matter of public concern.)

Having determined the press release involved a matter of public concern, the Ninth Circuit conducted the balancing test required by *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968) ("*Pickering*"), weighing "the interests of the [employee] as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." First Amendment protection will not be accorded to statements by public employees unless their free speech interests clearly outweigh their employer's interest in avoiding material disruption. This, like the *Mt. Healthy* analysis, is a fact sensitive inquiry. Based upon the facts in the record, the Ninth Circuit considered a number of different factors and concluded that Garrison's interest in speaking out was greater than the risk of potential disruption. App. at 54-55.

Even so, petitioners urge that the Ninth Circuit erred in not finding that they were protected by qualified immunity. Petitioners' view is that because *Pickering* involves a "multi-factor" balancing test, it "all but compels qualified immunity for officials who turn out to be wrong about what the law requires." Petition at 19. However, the Ninth Circuit held that petitioners were not entitled to qualified immunity because "the *Pickering* balancing test so clearly weighs in favor of Garrison that it was patently unreasonable for defendants to conclude that the First Amendment did not protect his speech." App. at 60.

In support of their position, petitioners quoted from a number of decisions in which defendants are granted qualified immunity from prosecution for violation of plaintiff's constitutional rights. Petition at 19-20. The language petitioners quote is similar from case to case and amounts essentially to a boilerplate comment from the courts concerning the difficulty of finding a "clearly established right" in a fact-intensive inquiry which requires balancing of competing interests. For example, from *Moran v. State of Washington*, 147 F.3d 839, 847 (9th Cir. 1998) ("*Moran*"), petitioners quote language stating that because the *Pickering* test is so fact-sensitive, the law regarding First Amendment claims "will rarely, if ever," be sufficiently 'clearly established' to preclude qualified immunity. Petition at 20. However, even the *Moran* decision recognized that "there will be the occasional case in which existing case law is so closely on point that the law relating to a public-employee-speech claim might be said to be clearly established." *Id.* at 847 n.5. Further, the court there declined to endorse a "per se" rule, which is essentially the position petitioners take herein. *Id.*

The Ninth Circuit's decision in *Gilbrook* is entirely consistent with *Moran* in that it is a fact-driven conclusion that Garrison's First Amendment protection for his press release should have been obvious to petitioners. This case, given the weight of public interest in being informed about the adequacy of public safety services, is precisely that "occasional case" referred to in *Moran*.

Further, numerous other courts apply the *Pickering* analysis and nevertheless are able to discern situations in which qualified immunity is not warranted, even where, as here, the defendants offer numerous arguments as to

why it was unclear that the plaintiff's First Amendment rights have been violated. Indeed, virtually all defendants argue that their difficulty in discerning a "clearly established right" should entitle them to qualified immunity. *See Paradis and Ryan v. Montrose Mem. Hosp., County of Montrose*, 157 F.3d 815, 819 (10th Cir. 1998) (Court affirms denial of qualified immunity where two nurses were constructively discharged in retaliation for speaking out about administrator's illegal and unethical conduct.); *Chappel v. Montgomery County Fire Protection Dist. No. 1*, 131 F.3d 564, 579-80 (6th Cir. 1997) (Court affirms denial of qualified immunity for defendants who took a series of retaliatory actions against plaintiff who spoke out about inadequacies and irregularities in management of city's ambulance service; "The number of defendants' arguments and the length of our responses, however, should not be taken as an indication that the defendants have pressed a colorable defense"); *Walker v. Schwalbe*, 112 F.3d 1127, 1133 (11th Cir. 1997), *cert. denied*, 1998 U.S. Lexis 3107 (Court affirmed denial of qualified immunity to defendants who demoted plaintiff for speaking to legislators about budget concerns and possible improprieties); *Marshall v. Allen*, 984 F.2d 787, 795-97 (7th Cir. 1993) (Court affirmed denial of qualified immunity to defendants who fired plaintiff for speaking out in favor of four women colleagues in Housing Authority who complained of unequal pay and working conditions.)

The Ninth Circuit carefully addressed each of petitioners' arguments in support of their position that Garrison's First Amendment right to speak out was not clearly established and refuted their application to the instant

case, as was done in each of the cases cited above from sister circuits. Further, as the Eleventh Circuit stated,

> "When considering whether the law applicable to certain facts is clearly established, the facts of cases relied upon as precedent are important. The facts need not be the same as the facts of the immediate case. But they do need to be materially similar." *Walker, supra* 112 F.3d at 1132 (citation omitted.)

Because there were several extremely similar precedents and because it found the particular facts at hand to be so compellingly demonstrative of the context in which a public employee's speech must be protected, the Ninth Circuit found the presumptions in favor of qualified immunity were overcome. This case is a straightforward, correct application of *Pickering*. Under such circumstances, there is no reason for the Supreme Court to hear this case.

V. ADMISSION OF EVIDENCE ABOUT DAMAGES FROM CONSPIRATORS' VIOLATION OF RESPONDENTS' FIRST AMENDMENT RIGHTS WAS WELL WITHIN THE TRIAL COURT'S DISCRETION.

It was undisputed below that respondents suffered emotional distress from the date they were presented with notification of discipline until the present. Petitioners challenged the introduction of evidence regarding emotional distress suffered *prior* to the discipline as irrelevant and prejudicial. However, the jury not only found petitioners Anderson and Demonaco liable to plaintiffs for retaliatory discipline, but it also found that they and

the four other petitioners had conspired to retaliate against respondents because of the firefighters' political activity.

In an action arising under 42 U.S.C. § 1983, damages are awarded to compensate for injuries caused by the deprivation of constitutional rights. *Carey v. Piphus*, 435 U.S. 247, 254, 98 S. Ct. 1042, 1047, 55 L. Ed. 2d 252 (1978). In determining how to compensate plaintiffs, the jury was entitled to consider all relevant evidence regarding plaintiffs' injuries suffered as a proximate result of both the discipline and the conspiracy to violate their rights. Respondents clearly suffered emotional distress from the acts of the conspiracy. Petitioners' actions unfolded over two years with threats to firefighters' jobs and their right to speak freely, and finally culminated in discipline. The evidence of emotional distress stemming from these activities was relevant to prove plaintiffs' damages.

Moreover, this evidence was not prejudicial because the non-economic damages were not excessive. In civil rights cases, the jury's damage award verdict is entitled to more weight than in ordinary cases, because of inherent difficulty in giving such rights a dollar value. *Collum v. Butler*, 288 F.Supp. 918 (D.C. Ill. 1968), *aff'd*, 421 F.2d 1257 (7th Cir. 1970). Yet, by any measure, the non-economic damages awarded here were not excessive. The awards made by the jury would have been reasonable and clearly supported by the evidence, even if they were to compensate only for the emotional distress suffered after the discipline. *See, e.g., Sykes v. McDowell*, 786 F.2d 1098 (11th Cir. 1986), *Pieczynski v. Duffy*, 875 F.2d 1331 (7th Cir. 1989), *Matulin v. Village of Lodi*, 862 F.2d 609 (6th Cir. 1988). Petitioners are trying to elevate their dispute

with the court's discretionary and harmless admission of evidence to the level of a constitutional issue. Petitioners' arguments are inflating this issue beyond its true dimensions. It is not a matter for review by our highest court.

CONCLUSION

For all of the reasons outlined above, respondents request that this Court deny the Petition for Writ of Certiorari.

Dated: October, 1999

Respectfully submitted,

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